BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE,
NO. 06-432, TERRI-ANN MILLER

CASE NO. SC07-1985

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RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Honorable Terri-Ann Miller, by and through her undersigned counsel, to move the Honorable Chair of the Hearing Panel, pursuant to his authority under Rule 7(b) of the Florida Judicial Qualifications Commission Rules (FJQCR) and pursuant to Fla.R.Civ.P. 1.510, made applicable to the Judicial Qualifications Commission (hereinafter referred to as "JQC) by its Rule 12(a), for an Order granting Summary Judgment in favor of the Respondent as to each of the three counts contained in the Second Amended Notice of Formal Charges, alleging violations of the Canons 7A(3)(a) and 7(A)(3)(d)(ii) of the Code of Judicial Conduct served by the JQC on April 8, 2008, and as grounds, the Respondent would state the following:

PROCEDURAL GROUNDS

1. A party against whom a claim is asserted may move for a summary judgment in that party's favor as to all or any part thereof, at any time with or without supporting affidavits.

2. A summary judgment shall be rendered forthwith upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 1.510(c), Fla.R.Civ.P.

3. Summary judgment or partial summary judgment is available in a judicial disciplinary proceeding. Rule 1.510 (c), Fla.R.Civ.P.; Rule 7(b) and Rule 12(a), FJQCR; *Cf., The Florida Bar v. Daniel*, 626 So.2d 178, 182 (Fla. 1993) (summary judgment is available in attorney disciplinary proceedings), which was cited recently in *Thompson v. Florida Bar, 526 F.Supp.2d 1264 (S.D. Fla., 2007)* and *The Florida Bar v. Miravalle, 761 So.2d 1049, 1051 (Fla. 2000)* (referee has the authority in unlicensed practice of law case to enter a summary judgment under the circumstances, when it is shown there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law).

MATERIAL FACTS

4. The material facts are as follows as to which there is no genuine issue:

a.

SUMMARY OF JUDGE MILLER'S ELECTION EXPERIENCE

YEAR	POSITION SOUGHT	STATUS	PRIMARY DATE	RESULT
1992	Dade County Judge	Filed, Qualified	September 1, 1992	Elected
1996	Dade County Judge	Filed, Qualified	September 3, 1996	Elected
2000	Dade County Judge	Filed, Withdrew		
2000	Broward County Judge	Filed, Qualified	September 5, 2000	Wrongfully[1] Disqualified
2002	Broward County Judge	Filed, Qualified	September 3, 2002	Defeated
2006	Broward County Judge	Filed, Qualified	September 5, 2006	In Runoff for General Election
2006	Broward County Judge	Runoff	November 7, 2006	Elected

[1] See *Miller v. Mendez, 804 So.2d 1243 (Fla. 2001)*, disapproving *Miller v. Gross, 788 So. 2d 256 (Fla. 4th DCA 2000)*.

b. Judge Miller was a county court judge in Miami-Dade County from 1993 until 2001. She retired from her seat at the completion of the term. After that time, until she took the bench again in 2007, she was an attorney practicing law.

c. Judge Miller decided to build a house in Broward County, and withdrew from the 2000 election. She then decided to run for Broward County judge in the September 5th, 2000 primary and was wrongfully disqualified as a candidate in that primary. (See footnote #1 on page 3 for details and cites to the appellate decisions that explain why). During her 2006 primary campaign, Judge Miller used campaign signs originally printed for the September 5th, 2000 primary, which stated, "Vote September 5 and Elect Judge Terri-Ann Miller for County Court Judge." She never used all of the signs she had printed and had saved a small package of them as a memento, which she found again over Labor Day Weekend, 2006, when her garage was being reorganized.

d. Prior to using these leftover signs in the 2006 primary election, (which she only considered using since the date of the primary, was, coincidentally, once more September 5th), Judge Miller placed small labels with the word "FORMER" on the left side, adjacent to the word Judge. This was done on the Sunday or Monday (Labor Day), the day

before the primary. She used blank labels she already had on hand, and printed both the word "FORMER" and the proper campaign disclaimer required for 2006 on these labels on her home computer printer. She also used blank, round ¾ inch orange labels to cover the two uses of the word Judge before her name in the disclaimer. The word "FORMER" was printed in the largest font available for that size label to fit in the area of the sign before the word "Judge".

e. Judge Miller used a total 10 to 15 of these signs during the 2006 primary and placed them the night before the primary at 11 larger polls only where multiple precincts would be voting. These signs were placed in locations with the intention that people would have to walk past them to see them on their way from the parking lots to the polls.

f. During the 2006 campaign, Judge Miller used other campaign materials which advertised her eight years as a county judge, eight years judicial experience and acting circuit judge experience.

g. The palm cards/absentee mailers Judge Miller used for the primary included the phrase "acting circuit judge" and "8 years as a county judge" as part of a bullet-style presentation of her professional experience exactly as she had done in her previous election contests both in 2000 and 2002. No one had previously complained of her using this style and

wording. It is common practice in campaign literature to highlight the experience which you wish to emphasize by using a bullet style presentation. However, when Judge Miller received a Florida Elections Commission complaint about the use of this phrase "acting circuit judge," she acted upon it and changed the palm card/absentee mailer to state "acting circuit judge experience." A copy of the palm card used in the 2002 election was furnished to the JQC investigatory panel at the hearing which took place on May 18, 2007. A copy of the template of the front and back is attached hereto as "Exhibit A1 and Exhibit A2." A copy of the back of absentee mailer template used in 2002 is attached hereto as "Exhibit B." A copy of the back of the absentee mailer template used in 2000 is attached hereto as "Exhibit C." A copy of the template of the front of the palm card used in 2000 is attached hereto as "Exhibit D."

h. *After* the primary, Judge Miller hired a political consultant who had previously been helping one of her primary opponents who did not succeed. That consultant, who had seen these palm cards/absentee mailers that Judge had been using during the primary, asked her if she had any picture of herself in her judicial robe, because if she did, she should put that photo of herself on the campaign materials so that people would see that she had been a judge. The only pictures Judge Miller had of herself

in a robe was from her investiture as a Dade County judge in 1993, and she thereafter used one of them on the palm cards/absentee mailers she had printed for the general election, with the caption "8 Years Experience as County Judge". Including this picture in her campaign materials was not her idea. Judge Miller read Judicial Ethics Advisory Committee (JEAC) Opinion 2006-16 prior to deciding to use this picture. And, since there was an opinion which Judge Miller reasonably believed was on point, she felt there was no need to seek an additional opinion from the JEAC on this matter. That opinion is attached hereto as "Exhibit E."

i. The palm cards/absentee mailers Judge Miller used in both the 2006 primary and 2006 general elections listed her 27 years experience as an attorney.

j. All of the campaign advertising material Judge Miller used in her 2006 primary and 2006 general election campaign used the word "elect" and not "re-elect" and had the word "for" between her name and the office for which she was seeking, both so as not to imply incumbency in strict compliance with Florida Statute 106.143(5).

k. Two lawyers who were closely connected to the campaigns of

two of her three opponents in the primary[2] each filed a complaint with the Florida Elections Commission making basically the same complaints that bring us before the JQC in this matter. Then candidate Miller responded to the Commission. The Commission found no probable cause and dismissed the two complaints against Judge Miller based on the same campaign

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[2] One of the lawyers was Kevin Unger. As previously stated, Judge Miller was a Miami-Dade county judge for eight years between 1993 and 2001. Mr. Unger is a principal in the Broward-based traffic ticket clinic Unger and Kowitt, located in Plantation, (Broward), Florida. Judge Miller presided over many civil infractions where Mr. Unger's firm was the attorney of record. Apparently, he was still upset with her for giving points to his clients at the time, which she may have done if a person was going 35 in a school zone, or who had received more than a couple of infractions in a year. If she assessed his clients points, he would have to return the fee since he offers the "no points, guarantee," plus the possible loss of a lucrative, traffic scofflaw client. Old feelings must die hard and Mr. Unger's displeasure with Judge Miller was expressed to her when (then) attorney Miller actually met Mr. Unger, for the very first time, at the beginning of 2006, while at court in Plantation, Broward County. He had always sent a surrogate to cover his cases at the North Dade Justice Center where Judge Miller presided from 1997 to 2001 and where she presided over hundreds of infractions each week. He told her he thought she had been "too tough" as a judge, and even asked another traffic ticket clinic attorney present to concur with this statement.

Since Judge Miller took the bench again, Mr. Unger has regularly moved to recuse her, first based on his possibly being a witness against her in any Florida Elections Commission proceeding, and now as a witness for the JQC. He also states in his motion to recuse that he is close friends with her former opponent Brenda DiIoia and worked on Ms. DiIoia's campaign to defeat Judge Miller.

The other lawyer, Russell Williams, was a major supporter and good friend of another former opponent, Garrett Elsinger.

materials shown as exhibits in the appendices filed by the JQC to the Second Amended Notice of Formal Charges on April 8, 2008.

ARGUMENT

5. Canon 7A(3)(d)(ii) of the Code of Judicial Conduct provides in pertinent part, that a candidate for judicial office shall not:

> (ii) knowingly *misrepresent* the identity, qualifications, present position or other fact concerning the candidate or an opponent; (emphasis added).

BLACK'S LAW DICTIONARY 521 (6TH ED. 1990) defines "misrepresentation" as an untrue statement of fact, or an incorrect or false representation.

6. The JQC in its Second Amended Notice of Formal Charges has failed to allege any knowing factual misrepresentation by Judge Miller within the materials cited by them. She used signs employing the word "for" between her name and the position to which she was seeking election. This complied with the statute and avoided the implication of incumbency and in doing so, Judge Miller did not misrepresent her status.

7. By definition, the campaign materials used by Judge Miller are considered political advertisements, as defined by Florida Statute 106.011(17).

Florida Statute 106.143(5) states what language is required in political advertisements so as not to falsely imply incumbency. It states:

> No political advertisement of a candidate who is not an incumbent of the office for which the candidate is running shall use the word "re-elect." *Additionally, such advertisement must include the word "for" between the candidate's name and the office for which the candidate is running, in order that incumbency is not implied.* (Emphasis added.)

8. The Florida Elections Commission concluded, after two complaints alleging violations of this Florida Statute 106.143(5), that there was no probable cause to charge Judge Miller with violations of this statute and hence, dismissed same.

9. The Preamble states that the Code of Judicial Conduct "should be applied consistent with constitutional requirements, *statutes*, other court rules and *decisional law* (Emphasis added.)

Although the Code of Judicial Conduct does not define the term "decisional law," it is suggested that this determination by a quasi-judicial administrative body such as the Florida Elections Commission, which was required to investigate or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions, should be regarded as decisional law within the context of this term as contained in the Preamble to the Code of Judicial Conduct. As such, if the Code of Judicial Conduct is to be applied

consistent with this decisional law as to whether Judge Miller implied incumbency in her campaign materials, it can be said that Judge Miller did not do so , as a matter of law, for a determination has already been made on this issue by the decisions of the Florida Elections Commission with its findings of no probable cause and dismissing the complaints alleging she violated the statute which determines how incumbency is implied in political advertisements.

10. The JQC alleges that the use of the word "FORMER" on a sticker was so disproportionately small that it could hardly be said to be a "meaningful disclaimer." There is no Florida statute that mandates any particular size, style or font type for printing on campaign signs. Inasmuch, the JQC has thereby failed to state the standard of conduct, statute, or rule which was specifically violated and what precisely a "meaningful disclaimer" is, according to law.

11. The Florida Supreme Court in *In re:Kinsey, 842 So.2d 77 (Fla. 2003)* ruled Kinsey's a campaign flyer contained a knowing misrepresentation of one of her opponent's rulings. This knowing misrepresentation consisted of Kinsey's using of a portion of a ruling by her opponent, which she presented in bold and large letters, to convey a false impression of the actual ruling. The truthful representation of the actual

ruling, though located in the same flyer, besides being in very small print, was printed on the flyer in such a manner that the Court concluded that the voters were not meant to read each of the articles as the reprinted articles were stacked on top of each other so portions of the article could not be read.

There is no dispute that Judge Miller used small stickers with the word "FORMER" placed next to the word judge on a campaign sign, and there are no material facts to suggest that this qualifier was not meant to be read, or that the sum total of the use of the word "FORMER" with the word judge as a whole, is a knowing misrepresentation. Judge Miller's campaign signs were not an example where the voters were required to read fine print elsewhere on the item of campaign material to correct an alleged knowing misrepresentation as in *In re: Kinsey, supra*. Indeed, the Florida Supreme Court in 2006 in *In re: Renke, 933 So.2d 483 (Fla. 2006),* refined and interpreted its ruling in *In re: Kinsey, supra*, when it held that,

> smaller or other text ***elsewhere***
> in a brochure does not serve to rectify bold
> misstatements made in the same document.
> (Emphasis supplied). *933 So.2d at 488*

Thereby, there is no genuine issue of material fact of a violation of 7(A)(3)(d)(ii), in light of the Court's decision in *In re: Renke, supra*, on this specific issue since her sticker stating "FORMER" was adjacent to the word judge on her campaign sign to make an accurate representation of her (then)

present status thereby disavowing incumbency, as a matter of law.

12. Further, a careful reading of *In re: Renke, supra* shows even more of the immateriality of these facts as they pertain to Judge Miller. Candidate Renke, knowingly misrepresented that he was a judge when he was not, by failing to use the word "for" between his name and the position he was running for in a brochure, ("John Renke, a Judge with Our Values," *In re: Renke, supra at page 485*). In *In re: Renke, supra,* it was the use of this phrase *combined with* other text from the brochure stating Renke had "real judicial experience as a hearing officer and in hearing appeals from administrative law judges," *In re: Renke at page 487.* This led ultimately to the Florida Supreme Court's determination that Judge Renke "knowingly and purposefully created the impression that he was running as an incumbent judge when he was not," *In re: Renke at page 487*. The JQC has failed to allege any combination of acts or conduct on the part of Judge Miller which would thereby give rise to a supposedly sufficient allegation that she misrepresented her status as an incumbent. As can be seen on the exhibits which are part of the Appendices to the Second Amended Notice of Formal Charges, on the aforesaid campaign signs, that had the sticker stating the word "FORMER" next to word "Judge" no mention was made of any judicial experience. Similarly, on the signs and other campaign materials

that describe her judicial experience, there was no use of the word Judge as a title. What is to be garnered then from *In re: Renke, supra,* is, that the implication of incumbency in campaign materials requires at least two acts performed together, one of which must be a knowing factual misrepresentation[3]. Clearly, the facts alleged against Judge Miller in the Second Amended Notice of Formal Charges, when measured against those in *In re: Renke, supra*, are thereby insufficient, as a matter of law, to improperly imply incumbency.

13. The JQC has failed disclose any evidence of acts or conduct which were "calculated" acts or conduct to attain the advantage of incumbency in her campaign materials. Regardless, there is no alleged factual violation of any legal standard of conduct that was violated while allegedly doing so. A candidate is free to discuss his or her background and qualifications for the position. *In re Kinsey, supra, at page* 89. Since Judge Miller was in fact a Miami-Dade County Court Judge for 8 years, as a matter of law, she had a right to discuss her experience and

[3] It should be noted that Renke was found not guilty by the JQC in Count 4, of knowingly and purposefully representing his experience when he described himself as having "real judicial experience as a hearing officer in hearing appeals from administrative law judges," when his actual participation was limited to one instant where he acted as a hearing officer and to other instances where he was sitting as a board member of an administrative agency in the same brochure where, among other things, he described himself as "John Renke, a Judge With Our Values." *933 So.2d at 485,486*.

doing so is not a violation of any standard of conduct or canon.

14. As a matter of law, there is no violation of any legal standard of conduct that was committed when Judge Miller used a photograph on the absentee/palm cards used in the general election which showed her wearing a robe from her investiture as a Dade County judge. A candidate is free to discuss his or her background and qualifications for the position. *In re Kinsey, supra, at page* 89. The photograph, in the instant matter was simply another way of truthfully showing her judicial experience.

15. Further, the JQC, in paragraph 5 of its Reply to Judge Miller's Motion to Dismiss Second Amended Notice of Formal Charges filed on May 8, 2008, concedes that the exhibits attached to the aforesaid Appendices to the Second Amended Notice of Formal Charges "emphasize" Judge Miller's judicial experience in both writing and pictures. Thereby, as a matter of law, this is not a a knowing misrepresentation of Judge Miller's experience and qualifications for judicial office, which would support a violation of Canons 7A(3)(a) or 7(A)(3)(d)(ii).

16. There is no genuine issue of material fact that even if Judge Miller had failed to disclose with particularity or emphasize that she was an attorney practicing law who was a former county judge, that such omission constitutes a knowing misrepresentation of the qualifications, present position or other

fact concerning her as a candidate.

17. BLACK'S LAW DICTIONARY 521 (6TH ED. 1990) defines "omission" as the neglect to perform what the law requires.

18. As a matter of law, there was no law, standard of conduct, or canon affirmatively requiring a judicial candidate to disclose what her present status was at that moment in time. A candidate is free to discuss his or her background and qualifications for the position. *In re Kinsey, supra*. There was no law or rule that required Judge Miller to make any such disclosure, therefore, there cannot be a unlawful "omission."

19. Canon 7A(3)(d)(ii) only requires that which is affirmatively stated does not "knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or opponent." Most succinctly, what is represented has to be true. The JQC does not maintain that what she stated in her campaign materials was not in fact true.

20. Canon 7A(3)(d)(ii) does not define knowing misrepresentation to include misrepresentation by omission. As a matter of law, to hold Judge Miller to this un-codified standard of conduct would be both in violation of the express words and explicitness of this Canon.

21. Canon 7A(3)(d)(ii) is the codified embodiment of limitation or proscription of what a judicial candidate shall not do. To expand this to include

misrepresentation by omission is contrary both to the manner and language in which this negative precept is written.

22. Instead, the JQC has attempted to create a cause of action for violation of the Canons for knowingly omitting the identity, qualifications, present position or other fact concerning the candidate or an opponent where none exists.

23. As a matter of law, the JQC cannot create a duty for which Canon 7(A)(3)(d)(ii) does not provide. If one wanted to impose such a duty on judicial candidates, the Canons would need to state precisely what each judicial candidate must say. The Canons do not. Rather, and more specifically, Canon 7(A)(3)(d)(ii) provides guidance by proscribing what a candidate may ***not*** do. Such an expansion of these Canons by the JQC would invade the very province of Florida Supreme Court and violate the spirit of the Preamble to the Code of Judicial Conduct. The Preamble to the Code of Judicial Conduct states that it is designed to provide guidance to candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies.

CONCLUSION

24. As shown hereinabove, there is no genuine issue of material fact concerning the allegations of the JQC in the Second Amended Notice of

Formal Charges, and Judge Miller should be entitled to judgment as a matter of law as to all counts in the aforesaid Second Amended Notice of Formal Charges.

WHEREFORE, The Honorable Terri-Ann Miller respectfully requests that the Chair of the Hearing Panel issue an Order granting Final Summary Judgment in her favor on all counts of the Second Amended Notice of Formal Charges.

Dated this 9th day of February, 2009.

Respectfully submitted:

/s/_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished as listed below this 9th day of February, 2009, to the following:

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Also, per Rules 9, and 10 of the Florida Judicial Qualifications Commission, all of our pleadings are being filed as follows:

Original and one copy to the Clerk of the Florida Supreme Court by US Mail. An electronic copy will be sent to the Clerk of the Court per Supreme Court Rule: AOSC04-84. Email to: e-file@flcourts.org

A copy will be sent directly to the Chair of the Hearing Panel, Judge Jesse Preston Silvernail, 2825 Judge Fran Jamieson Way, Viera, FL 32940 by US Mail.

An additional 5 copies will be sent to the JQC c/o Mr. Schneider to be distributed to the full hearing panel.

By: _____
Michael A. Catalano, Esq.

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